United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2457

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN,

Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent

On Petition for Review of Orders of the
Securities and Exchange Commission

ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

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ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether Petitioner may obtain review in this Court of a series of orders summarily suspending trading in the securities of a company (a) when none of the orders is any longer in effect, (b) when Petitioner fails to show that he is aggrieved--a statutory requirement for standing to seek review--and (c) when Petitioner failed to seek relief before the Commission.

2. Whether (a) the creation of the Securities and Exchange Commission and the delegation to it of rulemaking and other powers, including

the authority summarily to suspend trading in a security for a limited period, are constitutional and (b) whether the Commission has abused its discretion in the exercise of its trading suspension power with respect to orders sought to be reviewed in this proceeding.

COUNTERSTATEMENT OF THE CASE

This matter comes before this Court on a petition for review of eight orders of the Securities and Exchange Commission ("the Commission"), each of which suspended trading in the common stock of Canadian Javelin, Limited ("CJL"), for a period of ten days on the American Stock Exchange ("Amex") and in the over-the-counter market.[1/] The Commission entered these orders pursuant to authority conferred upon it in Sections 19(a)(4) and 15(c)(5) of the Securities Exchange Act of 1934 ("the Exchange Act"), 15 U.S.C. 78s(a)(4) and 78o(c)(5).[2/] As the record reflects, each of the trading suspension

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1/ The suspension orders under review in this proceeding are dated November 29, 1973, September 4, 1974, September 13, 1974, September 24, 1974, October 4, 1974, October 11, 1974, October 24, 1974, and November 1, 1974.

2/ When these orders were entered, Section 19(a)(4) provided:

> "(a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors --
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> * * *
>
> "(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

(continued)

orders under review was undertaken upon an independent determination by the Commission that the public interest and the protection of investors so required (Appendix, pp. 5, 36, 39, 42, 45, 48, 51, 54).[3/]

Petitioner correctly notes in his Brief, at page 2 ("Pet. Br." 2), that the initial suspension of trading in CJL's common stock occurred on November 29, 1973, the day on which the Commission instituted a civil injunctive action against the company and certain of its principals. Securities and Exchange Commission v. Canadian Javelin, Ltd, et al., 73 Civil 5074, [1973 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,226.[4/] This action charged violations of Sections 5 (registration requirements) and 17(a) (anti-fraud provision) of the Securities Act of 1933, 15 U.S.C. 78e and 78l(a); violations of Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5 (antifraud provision); and violations of the annual and periodic reporting requirements contained in Section 13(a) of the Exchange Act, 15 U.S.C. 78m(a). On July 17, 1974, the district

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2/ (continued)
When these orders were entered, Section 15(c)(5) provided:

> "(5) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading, otherwise than on a national securities exchange, in any security (other than an exempted security) for a period not exceeding ten days. No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended."

In amendents to the Exchange Act that became effective in June 1975, the Commission's substantive powers under these sections have been consolidated in a new subsection (k) of Section 12 of the Act.

3/ References to the Appendix to Briefs are hereinafter cited as "App. ."

4/ The other defendants named were John C. Doyle, Chairman of CJL's Executive Committee and William A. Wismer, the company's president.

court entered a judgment of permanent injunction against all defendants. The judgment of the court also prescribed additional remedial relief, including a directive that the company "file within 60 days, or at such later time as the Commission may permit all necessary reports and all amendments and supplements. . . ." After the first trading suspension in the securities of Canadian Javelin, a series of Commission orders continued the suspension until January 26, 1975, shortly after the court-ordered reports were filed.[5/] The information presented to the Commission by its staff as the basis for instituting the injunctive action and for suspending trading in CJL concerned the filing of false reports with the Commission and the dissemination by the company of a series of press releases between

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5/ The Company did not mail its annual report to shareholders for the year ending December 21, 1973, until August 1974. Its quarterly reports required to be filed with the Commission on Form 10-Q for the periods ending March 31, 1974, June 30, 1974, and September 30, 1974, were not filed with the Commission until December 12, 1974. (Securities Exchange Act Release No. 11172, January 9, 1975, p. 2). On December 16, 1974, CJL sent a report to its shareholders and distributed it to the public. (Id., p. 2.) On January 9, 1975, the Commission announced that trading would resume in CJL shares on January 12, 1975 (id., p. 1). However, at the request of the Amex and CJL itself an additional ten-day suspension was entered on January 13 to permit the preparation of an orderly over-the-counter market for the shares in view of the fact that Amex was not yet ready to permit trading to resume. Finally, on January 22 at the request of the Amex and CJL a suspension order of four more days was entered so that trading on Amex and in the over-the-counter market could resume simultaneously. (Securities Exchange Act Release No. 11197, January 22, 1975).

While Petitioner notes (Pet. Br. 3) that trading in the securities of CJL was again suspended by the Commission on April 29, 1975, and the suspension has been continued by additional orders, this later suspension arises in a wholly different factual context and for reasons totally independent of the Commission's previous injunctive action and the previous suspensions. The later suspension was intended to permit dissemination of information concerning regulatory action against CJL by Canadian authorities. (Securities Exchange Act Release No. 11383, April 29, 1975.)

June and September 1973 containing false and misleading information relating to its purported development of Panamanian mineral properties. The dissemination of this information had been attended by a dramatic rise in the market price of the company's securities. (See pages 7-8, infra.) The false and misleading nature of theses press releases may be summarized as follows:

Press Release of June 22, 1973. This release attributed to Panama's Minister of Industries and Commerce the statement that CJL had "delineated one of the world's largest copper mines," when, in fact, the Minister had said, according to Reuters News Service, that CJL had a good copper deposit but that he lacked sufficient data to support the company's claim that it is "the greatest deposit in the world" (App. 8). The release also stated that "the company is now moving from the exploration state to that of construction," but actually no construction other than that incidental to exploration had been planned or initiated, and the Company had not yet located a source of financing for a project of such magnitude (App. 13). Moreover, based upon information from United States embassy officials and other sources, the press release appeared to be grossly misleading with respect to the progress of the company's negotiations with the Panamanian Government concerning mineral concessions (App. 14-15).

Press Release of July 5, 1973. A CJL subsidiary, Bison Petroleum and Minerals, Limited, issued a press release which stated that Pavonia S.A., another CJL subsidiary, had been granted a new mineral concession in Panama which was known to contain gold, silver, and other metals, and had assigned

the concession to Bison Petroleum (App. 16). On October 25, 1973, the Wall Street Journal reported that such a concession had not, in fact, been granted,[6/] and, accordingly, the American Stock Exchange halted trading in CJL securities. (App. 16.)

Press Release of July 17, 1973. This release represented that the company had met with Panamanian officials and indicated that substantial progress had been made in obtaining the mining concession from the government. The release implied that the Chief of Government had moved to expedite the project, when, in fact, he had advised company officials to exercise patience and to use normal government channels. (App. 17-18.)

Press Release of August 31, 1973. The company stated that certain geological reports had enabled it to finalize arrangements for the sale of the produce of its copper mines, when, in fact, sales negotiations were in a preliminary state at best (App. 19).[7/] CJL apparently had not even acquired any definite right to mine the copper at that point. (App. 19.)

Press Release of September 6, 1973. This release disseminated further misleading information with respect to the availability of financing for the Panamanian mining venture.[8/] It implied, moreover, that De Beers

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6/ The company admitted that no concession had yet been granted in a release on October 29, 1973 (App. 16).

7/ The later release on September 19, 1973, referred to a letter of intent to negotiate a sales contract (App. 19).

8/ The release stated that letters of intent had been proffered to the company covering offers of financing, when the letters apparently expressed only an intent to negotiate (App. 20).

Consolidated, Inc., had become CJL's second largest shareholder, when, in fact, De Beers had purchased no CJL stock at all. (App. 20-21.)

Press Release of September 19, 1973. William Wismer, CJL's president, announced that the company had signed a letter of intent with certain large European industrial concerns for the sale of the entire initial output of the copper mining project; but the agreement provided only for negotiation with respect to the sale of copper (App. 22-23). And once again the release seriously exaggerated the company's capacity to obtain the massive financing necessary to sustain the huge copper mining venture[9/] (App. 24.)

Before the Commission, when it initially exercised its summary trading suspension powers with respect to CJL on November 29, 1973, was not only a summary of the foregoing false press releases and references to the false reports filed with the Commission, but also to the staff's summary of trading activity in the company's securities during the time frame in which the false and misleading press releases were being distributed with respect to the Panama project (App. 26-27). According to that summary, on Friday, July 6, 1973, CJL's common shares closed on the Amex at 7-1/4. By the end of the following week (after the July 5 press release), the market price had advanced to 9-7/8 on active trading. By July 27, 1973, after the

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9/ For example, the release implied that sources had been found for the "entire loan financing for the project." Such an implication had to be regarded as premature in view of the fact that security for the financing was to have been a purchase contract that had not yet been negotiated (App. 24).

second in the series of press releases had been issued on July 17, an active market in CJL shares had driven the market price to 13-3/8 (App. 26). Through the month of August 1973, CJL's market price was stable, but the period from August 31 to September 14 (during which the August 31 and September 6 press releases were issued) was marked by extremely active trading in CJL shares, which rose five points and closed on September 14 at 18 (App. 26). Of the 2,400,000 shares of CJL stock traded on the Amex in the nine-month period ending September 30, 1973, at prices from 5-7/8 to 18, about 75% were traded during the three months ending September 30--the period in which the press releases were being distributed.

When the Commission suspended trading in CJL shares and sought judicial relief against the company, it also had before it further information provided by the staff that the company's financial condition had been misrepresented in filings with the Commission (App. 29-30) by the inclusion as a current asset of a $4.3 million claim against the Government of Newfoundland and Labrador that was not recognized by that government.[10/] When each of the other seven suspension orders sought to be reviewed was entered, these filings had not been corrected, nor had any corrections been made with respect to the misleading information disseminated to the public in the company's series of press releases. (App. 35, 38, 41, 44, 47, 50, 53.)

10/ In its 1972 Annual Report to Shareholders, in its Form 10-K Annual Report for 1972 filed with the Commission, and in its forms 10-Q filed with the Commission for the quarters ended March 31, 1973, and June 30, 1973, the company reported that the Government of Newfoundland and Labrador was required to pay it $4.3 million in reimbursement for a project from which that government had ousted the company. In its financial statements the company reported the amount as a current asset, when, in fact, a government official of Newfoundland and Labrador had repeatedly notified CJL that it did not recognize the claim. No mention of that government's position had been made in the filings. This misrepresentation greatly exaggerated the appearance of the company's working capital position. (App. 29-30.)

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commission's statutory authority summarily to suspend trading in securities for periods of ten days is indispensable to the maintenance of orderly capital markets. The grant of that authority with respect to securities traded on the national securities exchanges was deemed necessary by Congress when the Exchange Act was initially enacted (Section 19(a)(4)); the legislative judgment on that delegation of authority was reconfirmed and the Commission's exercise of that delegated authority approved in 1964, when the summary trading suspension power was enlarged to reach over-the-counter securities (Section 15(c)(5)). As noted at page 3, n.2, supra, these powers have been re-enacted in the 1975 amendments to the Exchange Act. When it determined to repose additional trading-suspension authority in the Commission by its 1964 amendment, Congress re-stated the role of that authority in the Commission's regulatory scheme:

> "The Commission could invoke this suspension power in those cases in which fraudulent or manipulative practices of the issuer or other persons have deprived the security of a fair and orderly market, or where some corporate event makes informed trading impossible and provides opportunities for the deception of investors." 11/

11/ Report on Securities Exchange Legislation of the Senate Committee on Banking and Currency, S. Rep. No. 379, 88th Cong., 1st Sess., p. 66 (1963).

The series of trading suspension sought to be reviewed here were undertaken by the Commission in response to precisely those circumstances foreseen by Congress--"fraudulent or manipulative practices of the issuer," which "deprived the security of a fair and orderly market."

While the summary trading suspensions authorized by Sections 19(a)(4) and 15(c)(5) are of short duration, they may be entered repeatedly where, as here, the Commission makes an independent determination that continued suspension is required in the public interest and for the protection of investors at the end of each ten-day suspension period. The Senate Report in connection with the adoption of Section 15(c)(5) makes that clear.

Although the statutes involved do not expressly authorize the Commission to repeat the ten-day trading suspensions, Congressional approval of such repetitions is made clear in the legislative history of Section 15(c)(5). Extending the summary suspension power to over-the-counter securities, Congress gave its approval to the Commission's exercise of the identical power with respect to securities traded on the national securities exchanges. In its report, the Senate Committee on Banking and Currency stated:

> "The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the ten-day period, it determines that another suspension is necessary. The committee accepts this interpretation. At the same time the committee recognizes that suspension of trading in a security is a drastic step and that prolonged suspension of trading may impose considerable hardship on stockholders. The committee therefore expects that the Commission will exercise this power with restraint and will proceed

> with all diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible." 12/

Congress made no express provision for review of orders suspending trading. In view of the short duration of each suspension order, court review of these orders was probably never contemplated by Congress. This is not to say that in an appropriate case judicial review could not be had. But whether such a suspension order should be reviewed in a district court, pursuant to the review provisions of the Administrative Procedure Act, or in a court of appeals, pursuant to the specific provisions of Section 25 of the Securities Exchange Act, 13/ is not clear. That question, however, need not be resolved here, because to obtain any kind of judicial review of administrative agency action, the

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12/ Id. at 66. Congress's knowledge and approval of the Commission's use of the summary trading suspension in repetition under appropriate circumstances is further evidenced in the legislative history of the 1975 amendments to the Exchange Act. A new subsection (f) is added to Section 12 of the Act by these amendments which gives the Commission power to suspend the registration of a security for a period of up to twelve months if after notice and opportunity for hearing the Commission finds that the issuer has failed to comply with any provision of the Act or rule thereunder. The new subsection also makes unlawful any trading in any such suspended security by any broker or dealer. In explaining the regulatory use foreseen for this new subsection the Senate Committee on Banking, Housing and Urban Affairs stated:

> "With this change, the Commission is expected to use this section rather than its ten-day suspension power in cases of extended duration."

S. Rep. No. 94-75, 94th Congress, 1st Sess., p. 106 (1975).

13/ These provisions appear infra, pp. 14 and 16.

complaining party must first seek relief before that agency; the Petitioner has not sought such relief. (See discussion, infra pp. 16-18.) But even if Petitioner had exhausted his administrative remedies, and even assuming, arguendo, that the court of appeals is the proper forum in which to seek review, Petitioner has not satisfied the statutory requirement of standing to seek review in this Court, having failed to show that he is "aggrieved" by the Commission's actions complained of or that he was a "party" to any proceeding, informal or otherwise, before the Commission, as Section 25 required.

ARGUMENT

I. THIS PETITION FOR REVIEW IS NOT PROPERLY BEFORE THIS COURT.

A. The Issues Presented by the Petition for Review Are Moot.

The series of trading suspensions sought to be reviewed here terminated in January 1975. While it is true that the Commission again suspended trading in the securities of CJL in April of this year and has entered orders continuing that suspension, these orders were for reasons wholly independent of the factual basis upon which the suspensions challenged in this Court were ordered. The Commission orders suspending trading in CJL stock beginning in April 1975 were not sought to be reviewed here; nor can these orders be regarded in any sense as a reoccurence of the Commission's previous actions with respect to Canadian Javelin, since they were entered for a wholly different reason. See p. 4, n.5, supra. Moreover, any CJL stock owned by the Petitioner when the earlier orders were entered could have been sold during the period from January 26, 1975, through April 29, 1975.

Courts do not sit "to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision. . . ." Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 284 (1969); see also, Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972).

It is true that an exception to the "mootness" principle has been recognized in controversies where the action complained of is "capable of repetition, yet evading review." Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). If Petitioner were seeking review of an active series of trading suspensions and his efforts were frustrated by the ten-day duration of the Commission's orders, that exception might well have force here. But the series of trading suspensions entered in conjunction with the Commission's enforcement action against CJL ended six months ago, and any complaints which Petitioner wishes to air with respect to that series of suspensions are purely hypothetical at this point.

B. Petitioner Lacks Standing To Seek Judicial Review of the Commission's Orders in Question.

Petitioner has failed to demonstrate that he has standing before this Court to seek review of the Commission's orders. Absent a showing that Petitioner has satisfied the requisites as to standing contained in the judicial review provision of the Exchange Act (Section 25), 15 U.S.C. 78y, this Court is without jurisdiction. Pursuant to that provision,

standing to seek review in the court of appeals of Commission orders entered under the Exchange Act is limited:

> "Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person is a party may obtain a review of such order in the United States Court of Appeals . . . ." 14/

The Petitioner has not explained to this Court how he [illegible]ved by the orders sought to be reviewed; indeed, he has shown no cogni[illegible]ble interest in the subject matter of the orders.[15/] In Independent Investor Protective League v. Securities and Exchange Commission, 495 F. 2d 311, 312 (C.A. 2, 1974), this Court dismissed petitions for review of orders entered by the Commission pursuant to the Investment Company Act of 1940, 15 U.S.C. 80a, et seq., holding that petitioners lacked standing, pursuant to Section 43, 15 U.S.C. 80a-42, the comparable review provision of that Act, because the petitioners had failed to allege that they "[had] suffered, or will suffer, actual injury or discrimination."

14/ While not applicable here, the Amendments to the Securities Exchange Act effective in June 1975 alter Section 25 to the extent that review will be available to "a person aggrieved by a final order of the Commission . . ." without the present requirement that the person seeking review shall have been a "party" to the proceeding before the Commission.

15/ The Petitioner has challenged, among other things, the constitutionality of the Commission's trading-suspension power in a civil action for damages and injunctive relief, Samuel H. Sloan v. Securities and Exchange Commission, et al., S.D. N.Y., 74 Civil 2792 (TPG). That action was dismissed for failure to state a claim upon which relief could be granted on February 14, 1975. The matter is presently on appeal to this Court, No. 75-7283. In his complaint in that action, Mr. Sloan alleged that he was the record owner of thirteen shares of CJL common stock.

A useful analogy is found in Sierra Club v. Morton, 405 U.S. 727 (1972), in which the Court construed the broad review provision of the Administrative Procedure Act. While acknowledging that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . .," id. at 734, the Supreme Court determined that a mere general interest in those things was insufficient to confer standing upon the Sierra Club. The appropriate test of "injury in fact" applied by the Court would require "more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." Id. at 734-735.

This element of "injury in fact" was retained and underscored in the subsequent decision in United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688-689 (1973), where it was stated that the person seeking review

> "must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." (Emphasis added.)

While the standard was met in that case, petitioner has not met it in the instant case.

In addition, the Petitioner was not a party to any proceeding before the Commission, as required by Section 25(a), when these appeals were taken. Had the Petitioner asked the Commission to lift these suspensions, presumably this requirement could have been met.

C. Petitioner Has Failed To Exhaust His Administrative Remedies.

Plaintiff has not alleged that he has, in any way, sought a hearing before the Commission. As far as we are aware, Mr. Sloan has never sought a hearing before the Commission, formal or otherwise, or made any attempt to demonstrate to the Commission that the public interest did not require these suspensions. While the trading suspensions in question were ordered by the Commission summarily, at any time after the initial CJL suspension on November 29, 1972, Petitioner could have made his views known to the Commission either informally or by formal application for a hearing with respect to the propriety of the suspensions. In doing so, as required by Section 25(a), he could have urged his objections before the Commission.[16/]

The Supreme Court has repeatedly held that court review must await exhaustion of the administrative process.[17/] And that doctrine applies to

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16/ At the time the petition for review was filed, Section 25(a) provided:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission."

The Act, as revised in June 1975, now provides in Section 25(c)(1):

> "No objection to an order or rule of the Commission, for which review was sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so."

17/ See, e.g., Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974); Allen v. Grand Central Aircraft Co., 374 U.S. 535 (1954); Franklin v. Jonco Aircraft Corporation, 346 U.S. 868 (1953), reversing 114 F. Supp. 392; Securities and Exchange Commission v. Otis & Co., 338 U.S. 843 (1949); Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 767-768 (1947); Federal Power Commissiion v. Arkansas Power & Light Co., 330 U.S. 802 (1947); Macauley v. Waterman Steamship Corp., 327 U.S. 540, 541, 543-545 (1946); Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375, 381-383 (1938); Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 50-51 (1938).

questions relating to the constitutionality of a statute as well as to other questions. See Allen v. Grand Central Aircraft Co., 374 U.S. 535, 553 (1954). Permitting agencies to decide in the first instance the matters presented gives the reviewing court the benefit of the agency's views and eliminates court review that might ultimately be unnecessary. As the Supreme Court observed in Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 767 (1947):

> "The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings."

While it is true that every ten-day trading suspension effected by the Commission pursuant to its statutory authority is initiated summarily, such action is immediately communicated to the public along with a statement of the reasons therefor. The logic of the exhaustion doctrine requires that persons seeking relief from trading suspension seek relief from the agency itself as a first step. And that doctrine applies to questions relating to the constitutionality of a statute as well as to other questions. See Allen v. Grand Central Aircraft Co., 374 U.S. 535, 553 (1954).

While there is no specific procedure for review of suspension orders, the Petitioner could have written to the Commission or filed a petition with it presenting his views. The failure of Petitioner to have attempted to obtain Commission consideration of the views which he asks this Court to adopt requires that his petition for review be denied.

II. THE CREATION OF THE SECURITIES AND EXCHANGE COMMISSION AND THE DELEGATION TO IT OF RULEMAKING AND OTHER POWERS INCLUDING THE AUTHORITY TO SUSPEND TRADING IN THE SECURITIES MARKETS ARE A VALID EXERCISE OF THE POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE.

On at least nine occasions of which we are aware this Court has considered challenges of various kinds to the constitutionality of the Exchange Act. In each case the constitutionality of the statute has been sustained.[18/]

The Exchange Act is a valid exercise of the power of Congress to regulate interstate and foreign commerce.[19/] As the Supreme Court stated in upholding the constitutionality of another statute administered by the Commission, the Public Utility Holding Company Act, 15 U.S.C. 79a, et seq.:

> ". . . Congress is completely uninhibited by the commerce clause in selecting the means considered necessary for bringing about the desired condition in

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18/ United States v. Persky, [Current] CCH Fed. Sec. L. Rep., ¶95,209, C.A. 2, June 18, 1975; United States v. Guterma, 281 F. 2d 742 (C.A. 2), certiorari denied, 364 U.S. 871 (1960); Securities and Exchange Commission v. May, 229 F. 2d 123 (C.A. 2, 1956); Gratz v. Claughton, 187 F. 2d 46 (C.A. 2), certiorari denied, 341 U.S. 920 (1951); Park & Tilford, Inc. v. Schulte, 160 F. 2d 984 (C.A. 2), certiorari denied, 332 U.S. 761 (1947); United States v. Minuse, 142 F. 2d 388 (C.A. 2), certiorari denied, 323 U.S. 716 (1944); Charles Hughes & Co., Inc. v. Securities and Exchange Commission, 139 F. 2d 434 (C.A. 2, 1943), certiorari denied, 321 U.S. 786 (1944); Smolowe v. Delendo Corp., 136 F. 2d 231 (C.A. 2), certiorari denied, 320 U.S. 751 (1943); Wright v. Securities and Exchange Commission, 112 F. 2d 89 (C.A. 2, 1940).

19/ There is no question that the securities markets subject to Commission oversight transcend state and often, as in the case at bar, international boundaries. See, Electric Bond & Share Co. v. Securities and Exchange Commission, 303 U.S. 419, 440 (1938); Wright v. Securities and Exchange Commission, supra, 112 F. 2d at 94; Smolowe v. Delendo Corp., supra, 136 F. 2d 231. The Commission's orders involved here concern trading in the securities of a foreign corporation on a national securities exchange and in the over-the-counter market throughout the United States. To assert, as Petitioner does (Pet. Br. 16), that these orders do not deal with interstate commerce is frivolous.

> the channels of interstate commerce. Any limitations are to be found in other sections of the Constitution. Gibbons v. Ogden, 9 Wheat. 1, 196."

American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 100 (1946). The Supreme Court there pointed out (id. at 105):

> "The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."

Sections 15(c)(5) and 19(a)(4) of the Exchange Act empowered the Commission summarily to suspend trading for limited periods where in its opinion "the public interest" and "the protection of investors" so required. The Commission submits that these provisions are a reasonable method of implementing the lawful purposes of the Exchange Act, and, hence constitutionally permissible. 20/

20/ Petitioner urges (Pet. Br. 16) that the Commission's trading suspensions are unconstitutional in that they interfere with a "right to contract." But his reliance upon Allgeyer v. Louisiana, 165 U.S. 578 (1897), as a barrier to governmental interference with "a right to contract" is meaningless in this context. That decision merely addresses the power of a state to assume jurisdiction of a foreign contract when its only nexus with the contract was the citizenship in that state of one of the parties. Indeed, far from supporting Petitioner's argument, the case expressly recognizes the permissibility of government regulation of a citizen's right to contract where jurisdiction is properly established:

> "It may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or businesses conflict with the policy of the State . . . ." Id. at 591.

The maintenance of fair and orderly trading markets is one of the major objectives of the Securities Exchange Act. The very title of the statute describes it as "an Act to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes." Since timing is of paramount importance in effecting a successful manipulation, in using advance information to the detriment of others, or in perpetrating a fraud upon the marketplace, regulation of the securities markets could not be expected to be "reasonably complete and effective," as intended by Congress (see Section 2 of the Act), unless the regulatory body were given authority to take immediate action. Indeed, the market's sharp response to CJL's false portrayal of its Panamanian mining prospects provides a textbook example of the need for summary trading suspension powers (see pp. 7-8, supra).

The standards prescribed by Sections 19(a)(4) and 15(c)(5) are fully adequate to guide the Commission in the exercise of its administrative discretion.[21/] Sections 19(a)(4) and 15(c)(5) require that the action of the

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21/ In Lichter v. United States, 334 U.S. 742, 785 (1948), the Supreme Court discussed the degree of specificity required of standards for a constitutional grant of discretionary agency power:

> "It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."

Commission be taken only in situations where such action is necessary or appropriate for the protection of investors and if the public interest so requires. Each of these two standards, "public interest" and "protection of investors," has been held adequate by the courts to satisfy constitutional requirements. In Wright v. Securities and Exchange Commission, 112 F. 2d 89, 94-95 (C.A. 2, 1940), this Court held that the "protection of investors" standard in Section 19 of the Exchange Act (subsection (a)(4) of which is before this Court in this action) is a sufficiently definite criterion to guide the Commission in the exercise of its administrative authority.[22/] Similarly, in American Sumatra Tobacco Corp. v. Securities and Exchange Commission, 110 F. 2d 117 (C.A. D.C., 1940), it was held that the "public interest" standard in Section 24(b) of the Exchange Act was "a sufficient guide," in the light of the "main purpose of the act . . . to insure the maintenance of fair and honest markets in transactions on national exchanges," and, accordingly, that no unconstitutional delegation of authority was involved.

The Supreme Court has repeatedly held that summary administrative action affecting property interests will be sustained in extraordinary situations where some valid governmental interest is at stake. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (summary seizure of pleasure

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22/ In Wright this Court heard a petition for review of a Commission order expelling a stock exchange member pursuant to Section 19(a)(3) of the Exchange Act, 15 U.S.C. 78s(a)(3), and held that the Congress' delegation of power to the Commission in that statute was constitutionally permissible. The matter was remanded for further consideration by the Commission, in its discretion, of the remedy it had imposed.

yacht); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (nonretention of state university teacher); Fuentes v. Shevin, 407 U.S. 67 (1972) (statute permitting summary replevin by private person); Fahey v. Mallonee, 332 U.S. 245 (1947) (appointment of savings and loan association conservator); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (multiple seizures of misbranded drugs); Bowles v. Willingham, 321 U.S. 503 (1944) (Emergency Price Control Act provision authorizing rent ceilings); Phillips v. Commissioner, 283 U.S. 589 (1931) (tax deficiency judgments without prior hearing on liability). Cf. Bell v. Burson, 402 U.S. 535 (1971) (summary suspension of vehicle registration and driver's license); Bi-Metallic Investment Co. v. State Board, 239 U.S. 441 (1915) (State ordered increase in property valuations). This Court has recently had occasion to apply this doctrine sustaining summary administrative action in the public interest. Pordum v. Board of Regents of State of New York, 491 F. 2d 1281, 1284-1285 (C.A. 2, 1974) (Commissioner of Education; summary suspension of teacher upheld).

Summary action is thus permissible where circumstances require, even though when the emergency requiring swift governmental action passes anyone who has shown a sufficient interest in the subject matter should be given an opportunity to be heard. In Ewing v. Mytinger & Casselberry, supra, 339 U.S. 594, the Food and Drug Administration's seizure without prior hearing of misbranded vitamins was upheld, the Court observing that "It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination."

(Emphasis added, id. at 599.) Accordingly, when suspensions of trading are renewed for additional ten-day periods after an initial summary suspension, persons showing a sufficient interest might well be entitled to a hearing and granted one after the initial suspension. But, as we have seen, the Petitioner in this proceeding has never asked for a hearing, informal or otherwise. He should not be heard to complain that he has been denied an opportunity to air his grievances with respect to the CJL suspensions at the Commission.

In sustaining the Federal Home Loan Bank Board's appointment of a conservator for the assets of a savings and loan association prior to a hearing the Court balanced the exigencies of banking and need for swift administrative action against the strength of the remedy:

> "This is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint, but in the light of the history and customs of banking, we cannot say it is unconstitutional." Fahey v. Mallonee, supra, 332 U.S. at 253-254.

Surely the rapidity with which transactions occur on the national securities exchanges and in a computerized over-the-counter market and the absolute necessity of maintaining secure and stable national capital markets must sustain the Commission's statutory authority summarily to suspend trading.[23/] The

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23/ The Court of Appeals for the District of Columbia Circuit, R. A. Holman & Co. v. Securities and Exchange Commission, 299 F. 2d 127, 132 (1962), has recognized that the performance of the Commission's statutory functions requires flexibility in the application of remedies, including the power to act summarily:

(continued)

nature of securities trading is such that immediate and substantial injury could result from even a day's delay in suspension. The public interest would be disserved by the Commission's postponing its initial suspension action pending the outcome of even the most abbreviated hearing.

III. THE COMMISSION DID NOT ABUSE ITS DISCRETION IN ORDERING THE SUSPENSIONS OF TRADING IN THE SECURITIES OF CJL SOUGHT TO BE REVIEWED.

One of the primary purposes of the trading-suspension provision is to prevent securities from being traded in the markets while the investing public is affirmatively misinformed or while the public is without sufficient information to make investment decisions with respect to the stock. The legislative history of Section 15(c)(5), as we have seen, p. 9, supra, mandates that the suspension power be used to that end "in those cases in which fraudulent or manipulative practices of the issuer or other persons have deprived the security of a fair and orderly market, or where some corporate event makes

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23/ (continued)

"In all the statutes under which the Securities and Exchange Commission operates, Congress has given it broad rule-making powers. See III Loss, Securities Regulation 1936 et seq. (1961). In view of the nature of the subject matter, the grant of such powers was imperative, to protect investors against fraud or deception made possible by constantly changing conditions."

Before the court in that action was a Commission rule which in effect summarily denied to an issuing company the availability of the small offering exemption from registration if any of the company's underwriters or officers was an underwriter of a securities issue subject to a pending suspension proceeding.

The court cited there a decision of the Supreme Court of Wisconsin upholding the constitutionality of the summary suspension of a stock broker's license under state law. Halsey, Stuart & Co. v. Public Service Commission, 212 Wis. 184, 248 N.W. 453 (1933).

informed trading impossible and provides opportunities for the deception of investors." It was understood that "[t]rading would be resumed as soon as adequate disclosure and dissemination of the facts material to informed investment decision were achieved."[24/] As we have seen, pages 5 - 8, supra, when the Commission entered its initial suspension of CJL securities, the company had disseminated fraudulent reports in a series of press releases with respect to the potential of its mining properties in Panama (App. 13-25), and the market had been responding dramatically to these false reports (App. 26-27). Moreover, at the time of the initial suspension of trading false financial reports had been filed with the Commission in violation of the statutory reporting requirements (App. 29-31). When each of the other seven suspension orders sought to be reviewed was entered by the Commission, the company had neither corrected these false filings with the Commission nor corrected the misleading statements disseminated directly to the public by the company (App. 35, 38, 41, 44, 47, 50, 53). In view of the clearly articulated purpose of Congress in reposing in the Commission discretion summarily to suspend trading "in the public interest" and "for the protection of investors," the Commission clearly acted properly.[25/]

24/ Report on Securities Exchange Legislation of the Senate Committee on Banking and Currency, S. Rep. No. 379, 88th Cong., 1st Sess., p. 66 (1963).

25/ Petitioner's argument (Pet. Br. 13) that "the orders of suspension of trading are a legal nullity because they are unsigned by any of of the Securities and Exchange Commissioners" is whimsical at best. Each of the orders is entered "By the Commission" and signed by the Commission's secretary. As Petitioner accurately predicted (Pet.

(continued)

CONCLUSION

For the foregoing reasons, this petition for review should be denied or, alternatively, the Commission's orders should be affirmed.

Respectfully submitted,

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July 1975

24/ (continued)
Br. 13), the Commission states that the Secretary signs orders as a ministerial act. Needless to say, the Commission has not delegated its "quasi-judicial authority" to its Secretary.

Equally frivolous is Petitioner's contention that he should be permitted, as a constitutional matter, to recover costs against the Commission should he prevail on the merits in this proceeding. Section 27 of the Exchange Act, 15 U.S.C. 78aa, provides:

> "No costs shall be assessed for or against the Commission in any proceedings under this chapter brought by or against it in the Supreme Court or such other courts."

The enactment of Section 27 is an exercise by Congress of the sovereign prerogative not to pay costs on behalf of the United States or one of its agencies. The constitutional authority of Congress to exercise that prerogative in its discretion has long been recognized. The United States Supreme Court has said of the "sovereign prerogative not to pay costs" that "Congress alone has power to waive or qualify that immunity." United States v. Chemical Foundation, Inc., 272 U.S. 1, 20 (1926). Accord, United States v. Worley, 281 U.S. 339, 344 (1929).

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

July 18, 1975

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A. Daniel Fusaro, Esquire
Clerk, United States Court of Appeals,
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Samuel H. Sloan v. Securities and Exchange Commission
No. 74-2457

Dear Mr. Fusaro:

Enclosed for filing are twenty-five copies of the Commission's brief as Respondent.

I certify that I have today caused two copies of the Commission's brief to be served by mail upon Samuel H. Sloan, Petitioner, 917 Old Trents Ferry Road, Lynchburg, Virginia 24503.

Very truly yours,

Thomas L. Taylor III
Attorney